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CHARLES ELMORE CROPLEY

In the

# Supreme Court of the United States

**OCTOBER TERM, 1950**

No. 466

WEST TEXAS UTILITIES COMPANY, INC.,
*Petitioner,*

*v.*

NATIONAL LABOR RELATIONS BOARD, et al
*Respondents*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

## AND

## BRIEF IN SUPPORT THEREOF

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*Respondent.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

---

*To the Honorable Chief Justice of the United States and to the Honorable Associate Justices of the Supreme Court of the United States:*

The Petition of West Texas Utilities Company, Inc. respectfully prays that this Court shall grant a writ of certiorari to the United States Court of Appeals for the District of Columbia which affirmed the order of the National Labor Relations Board ordering Petitioner to bargain collectively with the International Brotherhood of Electrical Workers, Locals 898, 920 and 1044, AFL, as the exclusive representative of all employees in the Petitioner's transmission, distribution and service departments with certain exceptions.[1]

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[1] Joint Appendix, page 42.

## OPINIONS BELOW

The Opinion and Order of the National Labor Relations Board is set forth in the Joint Appendix on pages 35 through 43, and is reported in 85 N. L. R. B. 1396. The Opinion and Order of the United States Court of Appeals for the District of Columbia Circuit is set forth on pages 179 through 186 in the Joint Appendix, and is reported in 184 Fed. 2d 233.

## JURISDICTION

The Judgment of the Court of Appeals was entered on the 10th day of July, 1950. Petitioners' petition for a rehearing and modification of the order was denied on September 28, 1950. Jurisdiction of this Court is invoked under Sections 1254 and 2101 of Title 28, United States Code, and Section 10(F) of the National Labor Relations Act, 29 U. S. C. A., 160(F), as amended by the Labor Management Relations Act, 1947. Petitioner also relies on Rule 38, Paragraphs 5(b) and 5(c) of this Court for its grounds upon which this petition is made.

## STATUTES INVOLVED

Labor Management Relations Act, 1947, 61 Stat. 136, 29 U. S. C. Supp. I, Sections 141, et seq.—[1]

## QUESTIONS PRESENTED AND ERRORS URGED

1. The Honorable Court of Appeals erred in its conclusion of law that Section 9(h) of the Labor Management

[1] Pertinent sections of Act printed in Appendix (5) of this petition and brief.

Relations Act, 1947, does not require the officers of the AFL to file the required affidavits as a condition precedent to any recourse by the Union to the facilities of the Board.

2. The Court of Appeals erred in holding that Petitioner, in relying upon a legal interpretation of the General Counsel of the Board that a labor organization is not in compliance with the requirements of Section 9(h), violates Section 8(a)(5) of the Act by refusing to bargain with that labor organization.

3. The Court of Appeals erred in deciding an important question of law (not raised or litigated by the principal parties to the litigation) which was raised for the first time in the Court of Appeals by an intervenor who had participated in the proceedings before the Board but had not raised the question there.

4. The Court of Appeals erred in holding that an employer violates Section 8(a)(5) of the Act by refusing to bargain with a local labor organization at a time when, due to the failure of the officers of the AFL to file the affidavits required by Section 9(h) of the Act, it is not entitled to invoke the remedial processes of the Act.

5. The Court of Appeals erred in holding that, in the absence of any evidence of causation and in the face of affirmative evidence to the contrary, the Board may indulge in a presumption that an employer's refusal to bargain caused a labor organization to lose the support of a majority of the employer's employees.

6. The Honorable Court of Appeals erred in sanctioning the Board's indulgence in a purely fictive attribution of a casual relationship between Petitioner's asserted unlawful refusal to bargain on September 19, 1947, because of the Union's non-compliance and the finding concerning the Union's loss of majority.

7. The Honorable Court of Appeals erred in upholding the Board's conclusion of law that Petitioner unlawfully refused to bargain with the Union on and after September 19, 1947.

8. The Honorable Court of Appeals erred in failing to find that Petitioner's refusal to bargain on November 8, 1947, and thereafter was justified by its well founded doubt of the Union's status as the representative of the majority of the employees in the appropriate unit.

9. The Honorable Court of Appeals erred in ordering Petitioner to bargain collectively with the Union as a representative of the majority of Petitioner's employees in the appropriate bargaining unit at a time when the Union no longer represented a majority of Petitioner's employees.

10. The Honorable Court of Appeals erred in refusing to set aside the Board's order.

11. The Honorable Court of Appeals erred in ordering enforcement of the Board's order.

## STATEMENT OF THE CASE

Review is sought of the Order of the Honorable Court of Appeals requiring Petitioner to cease and desist from

refusing to bargain with the International Brotherhood of Electrical Workers, Locals Nos. 898, 920 and 1044, AFL. These locals had been certified as the representative of the majority of the employees in an appropriate bargaining unit on August 12, 1946. During the period from September 19, 1947, to October 18, 1947, Petitioner refused to bargain basing such refusal on the express views of the Board's General Counsel that the officers of the American Federation of Labor (with which the IBEW is affiliated) must first file non-communist affidavits. The Board subsequently repudiated this interpretation,[1] and the company agreed to resume collective bargaining on November 10, 1947. On November 8, 1947, the company refused to bargain further because of the uncontradicted evidence that the Locals no longer represented a majority of the employees. A charge of unfair labor practice was then filed by the Locals and a complaint was issued by the General Counsel on June 24, 1948. We are not in accord with the statement made by the Honorable Court of Appeals to the effect that "Meanwhile, on November 8, the Federation officers had filed the affidavits allegedly required of them by 9(h), 29 U. S. C. A., Sec. 159(h)."[2] We are unable to find in the record any evidence of the date upon which the officers of the American Federation of Labor did comply with the filing of the non-communist affidavits.

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[1] *Matter of Northern Virginia Broadcasters, Inc.*, 75 N. L. R. B. 11 (1947).

[2] Joint Appendix, page 180.

## REASONS FOR GRANTING THE WRIT

I.

**The Honorable Court of Appeals for the District of Columbia Circuit has rendered a decision with a dissent by one of the justices, which decision is in direct conflict with the unanimous decisions of two other United States Courts of Appeals.**

II.

**The Honorable United States Court of Appeals for the District of Columbia Circuit has decided an important question of Federal Law which has not been, but which should be, settled by this Honorable Court.**

III.

**The United States Court of Appeals for the District of Columbia has decided a question of general importance, or a question of substance relating to the construction and application of a statute of the United States, which has not been, but should be, settled by this Honorable Court.**

IV.

**The United States Court of Appeals for the District of Columbia has decided a Federal question in a way probably in conflict with applicable decisions of this Honorable Court, and has so far departed from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's power of supervision.**

The argument of Petitioner in support of this Petition for Writ of Certiorari covering each of the aforesaid reasons for the granting of this Writ will be set forth in detail in the brief of Petitioner which is made a part of this instrument.

WHEREFORE, your Petitioner respectfully prays that a Writ of Certiorari issue out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the District of Columbia Circuit commanding that Court to certify and send to this Court for review and determination on a date certain, to be named therein, a full and complete transcript of the record and proceedings in the case numbered and entitled on its docket No. 10,465, *West Texas Utilities Company, Inc., Petitioner v. National Labor Relations Board, Respondent, International Brotherhood of Electrical Workers (AFL), Intervenor,* and that Petitioner may be allowed to present a complete brief on the merits of each of the questions raised herein and may have such other and further relief as may be just in the premises.

Respectfully submitted,

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I certify that copies of this petition have been furnished the Respondent, National Labor Relations Board and Intervenor, International Brotherhood of Electrical Workers (AFL).

FRANK CAIN.

In the

# Supreme Court of the United States

OCTOBER TERM, 1950

No. .....

WEST TEXAS UTILITIES COMPANY, INC.,
*Petitioner,*

*v.*

NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

*To the Honorable Chief Justice of the United States and the Honorable Associate Justices of the United States Supreme Court:*

### STATEMENT OF THE CASE

A statement of the case has already been given in the Petition and for purposes of brevity it will not be repeated here.

### ARGUMENT

#### Introduction

This Honorable Court has only recently in a most exhaustive opinion decided the constitutionality of Section 9(h) of the Labor-Management Relations Act of 1947.[1]

[1] *American Communications Assn. v. Douds*, 70 Sup. Ct. 674.

This Section is most commonly referred to as the "Non Communist Affidavit" provision.

In that case, this Court pointed out the fundamental purpose of the National Labor Relations Act which made the Act itself constitutional. The Court further pointed out that the Act was amended twelve years later to remove additional impediments to the free flow of commerce by passage of the Labor-Management Relations Act, 1947. The Court deemed it sufficient to state in its majority opinion that Congress had a great mass of material before it which tended to show that Communists and others prescribed by the statute had infiltrated union organizations for the prime purpose of furthering their advocacy of illegal overthrow of our form of government.

This provision of the statute and its application is the subject of this Petition. It is interesting to note that the conflicting opinions of both the United States Court of Appeals for the Fourth Circuit[1] and the United States Court of Appeals for the District of Columbia,[2] in which they predicate much of their respective conclusions upon the reasoning given by this Court in that case in construing the applicability of Section 9(h) of the Act.

It would appear to us that Congress surely intended to close all the avenues to such treasonable forces and foreclose the possibility of those forces furthering their illegal purposes. "No chain is stronger than its weakest link." The

[1] *National Labor Relations Board v. Highland Park Mfg. Co.*, No. 6082, reported in full in Appendix (1) of this brief.

[2] *West Texas Utilities Co. v. National Labor Relations Board*, No. 10465, reported in full in Appendix (2) of this brief.

decision of the United States Court of Appeals for the District of Columbia not only opens the avenue for such infiltration into the ranks of labor, but effectively destroys the purpose and intent of such provision of the Act.

## I.

**The Honorable Court of Appeals for the District of Columbia Circuit has rendered a decision with a dissent by one of the Justices, which decision is in direct conflict with the unanimous decisions of two other United States Courts of Appeals.**

The United States Court of Appeals for the Fifth Circuit in the case of *National Labor Relations Board v. Postex Cotton Mills, Inc.*,[1] on May 5, 1950, by unanimous decision held that officers of the Congress of Industrial Organization (CIO) were obligated under Section 9(h) of the Labor Management Relations Act, 1947, to file the non-communist affidavit, and their failure to do so with regard to that case caused the Court to refuse to enforce the order of the Board, and dismissed the same.

The National Labor Relations Board chose not to petition this Court for a Writ of Certiorari, and permitted the decision of that case to stand.

In the case at bar, the opinion of which is reported in full in the appendix to this brief, the United States Court of Appeals took cognizance of the fact that their decision

[1] *N. L. R. B. v. Postex Cotton Mills, Inc.*, 26 L. R. R. M. 2359, reported in full in Appendix (3) of this brief.

in this case was in direct conflict with the decision of the Court of Appeals for the Fifth Circuit when it said:

> "We are aware that our construction of 9(h) is in conflict with that of the Fifth Circuit in National Labor Relations Board v. Postex Cotton Mills, No. 12888 (5 Cir., May 5, 1950)."

The United States Court of Appeals for the Fourth Circuit agreed with the Fifth Circuit in the case of *National Labor Relations Board v. Highland Park Manufacturing Co.*, 26 L. R. R. M. 2531, on September 2, 1950, and disagreed with the United States Court of Appeals for the District of Columbia in which decision the court said in part:

> "We have carefully considered the argument to the contrary in the majority opinion in West Texas Utilities Co. v. N. L. R. B., D. C. App.—Fed. 2d—(26 L. R. R. M. 2359); but we are not impressed by it. We agree with the statement of Judge Russell in the Postex case, supra, that the Congressional purpose was to 'wholly eradicate and bar from leadership in the American Labor Movement, at each and every level, adherents to the Communist Party and believers in the unconstitutional overthrow of our government'."

On December 1, 1950, the Board filed in this Court its petition for certiorari (No. 425) to review this decision of the Court of Appeals for the Fourth Circuit.

We cannot conceive of a better grounds for this Honorable Court to grant this Writ. The question should be settled by this Court to stop the discriminatory application of this section of the law by the Board as it has not chosen to heed the unanimous opinions of two of the Courts of

Appeals, thus making the question of rights under the Act dependent upon what Circuit of the United States Court of Appeals the employer may find his case.

Upon the granting of this writ, Petitioner will file a complete brief upholding the position of the Fourth and Fifth Circuits on this point of law.

II.

**The Honorable United States Court of Appeals for the District of Columbia Circuit has decided an important question of Federal Law which has not been, but which should be, settled by this Honorable Court.**

III.

**The United States Court of Appeals for the District of Columbia has decided a question of general importance, or a question of substance relating to the construction and application of a statute of the United States, which has not been, but should be, settled by this Honorable Court.**

We shall argue these points together. As we have stated, the importance of the questions, of law raised by this Petition does not appear to us to even be questionable. However, in another respect, we suggest to be of even greater importance, is the very grievous error of the Court of Appeals in going completely outside the record and issues tried before the National Labor Relations Board and overruling a case of long standing decided by the Board regarding the construction and application of Section 9(h) of the Act.[1] This latter part of the Court of Appeals' decision

[1] *Matter of Andrews*, 87 N. L. R. B. No. 62, excerpts from case copied in Appendix (4) to this brief.

not only opens the gate wide in destroying the spirit and intent of the section, but VERY EFFECTIVELY NULLIFIES THE SECTION ITSELF, which we shall conclusively show in our brief on the merits of this case.

In Petitioner's motion for rehearing before the Court of Appeals, we pointed out that the Court had decided a question which was raised for the first time in the Court by the Intervenor Union. It was not raised by the Union before the Board (although the Union was a party to and participated in the proceedings below), nor by the General Counsel of the Board, nor by Petitioner.

Under these circumstances the Court's disapproval of the *Andrews* case and its contrary interpretation of Section 9(h) is in striking conflict with its holding in Part III of the Opinion where it refuses to consider a defense sought to be raised by Petitioner for the first time in that Court. If its decision in Part III is correct, the Court should equally have declined to consider this question also raised for the first time in that Court by Intervenor. If the Court of Appeals was to consider and decide this question, it should have had the benefit of full briefing and litigation of the question by the Board and by Petitioner, which it certainly did not have and refused to accept by overruling the Motion for Rehearing.

In such a full briefing and argument, Petitioner will show unto this Court that the Court of Appeals' interpretation of the Statute to require employers to bargain with labor organizations at a time when the non-communist disclaimer provisions are uncomplied with opens the door to

the very type of communist infiltration and disruption which Congress was at such pains to curb. Plainly the Court should not have, by deciding an unlitigated issue, rendered the statute in a manner so flagrantly designed as to thwart the Congressional purpose.

In the first place, the Court of Appeals assumed that the AFL had complied with the affidavit filing requirements at the time of the issuance of the General Counsel's complaint. Actually, there is nothing in the record of this case to show that the AFL has ever complied with the provisions of Section 9(h).

If this question were fully litigated, Petitioner would undertake to show that the procedure whereby the AFL sought to come into compliance with the requirements of Section 9(h) was ineffective to accomplish its purpose, and that, therefore, the AFL was not in compliance with Section 9(h) at the time the complaint was issued.

We urgently request this Honorable Court to review this erroneous decision of law by the Court of Appeals because such decision will place a burden of peril upon every employer, which will compel them, for economic reasons, if for no other, to disregard entirely the questions of whether or not they are dealing with outright communists in recognizing a union, settling grievances, or bargaining collectively with them. No employer would take the chance of using Section 9(h) as reason for refusing to deal with the known communist officers of a union whose refusal could, and possibly would, result in a strike, even though the employer knew that the union could not use

the facilities of the Board so long as this condition existed. The employer would know that at any time within a period of six months from date of his refusal the union could elect new officers who would sign the Non-Communist Affidavits and an unfair labor practice charge based on the decision of the Court of Appeals in this case could be brought and successfully prosecuted, resulting in irreparable injury to the employer. The technical reasoning of the court below is without foundation of fact or precedent and is contrary not only to the law, but is a flagrant destruction of the most "proven tool" that this Government has initiated in combating the infiltration of these treasonable forces into the ranks of labor.

## IV.

**The United States Court of Appeals for the District of Columbia has decided a Federal question in a way probably in conflict with applicable decisions of this Honorable Court, and has so far departed from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's power of supervision.**

In Part IV of its Opinion the Court of Appeals sanctioned the Board's indulgence in a purely fictive attribution of a causal relationship between Petitioner's asserted unlawful refusal to bargain on September 19, 1947, and the Union's loss of majority as of the date Petitioner refused to bargain further with the Union because of the uncontradicted evidence showing such loss of majority as of November 8, 1947. The Board made no finding of fact upon the basis of evidence in the record to support

this fictive attribution. It could not have done so because there is no evidence in the record to support this conclusion of causation. In fact, all of the evidence in the record negates the factual existence of such a causal relationship.[1]

In these factual circumstances the Court of Appeals has misapprehended the significance of the Supreme Court authorities relied upon by it, as well as the clear mandate of Section 10 of the Act.

As authority for permitting the Board to indulge this presumption of fictive attribution of causal relationship, without regard to evidence in the record and, in fact, in the teeth of the evidence, the court cites *Franks Bros. Co. v. N. L. R. B.*, 321 U. S. 702; *Medo Photo Supply Corp. v. N. L. R. B.*, 321 U. S. 678, 983, and *N. L. R. B. v. Lorillard Co.*, 16 N. L. R. B. 684, 699-701.

None of these cases, however, will sustain this proposition.

The *Franks Bros.* dealt with a situation in which the Union concededly represented a majority of the employees at the time of the employer's refusal to bargain, and the Supreme Court approved the Board's order to bargain on the basis that the Board may properly conclude that, "A requirement that union membership be kept intact during delays incident to hearings would result in per-

[1] Even allowing that Petitioner is precluded from relying on the evidence in the record to establish the loss of majority prior to September 19, 1947, as a justification for the refusal to bargain on that date, the Board may not disregard that evidence to hold Petitioner guilty of a later refusal to bargain at a time when the evidence clearly showed that the Union no longer represented a majority of the employees.

mitting employers to profit from their own wrongful refusal to bargain." 321 U. S. at page 704.

Examination of the opinion of the Circuit Court of Appeals, which was affirmed by the Supreme Court, clearly reveals that neither Court was approving a fictive attribution without regard to evidence, but rather a conclusion based upon evidence. The Court of Appeals recited the evidence which it conceived to give rise to the permissible inference of a causal connection between employer's conduct and the Union's loss of majority. 137 Fed. 2d 989 at 994, 995.

In the *Medo Photo* case, the Board found that the employees' repudiation of the union was induced by the employer's direct dealing with the employees. This finding was sustained by the Supreme Court as a finding of fact, based upon evidence, and not as a permissive fictive attribution without regard to evidence. It said:

> "From this and from evidence which it is unnecessary to detail, the Board concluded, and we accept its findings that the employees had not revoked their designation of the union as their bargaining agent before the wage increases were promised by petitioner's manager on June 9th; that the increases were induced by negotiations begun with petitioner on June 7th and concluded on June 9th before they had repudiated the union; that petitioner's determination to increase wages was 'occasioned solely by the employees' offer to withdraw from the union if the raises were granted,' and that the employees' defection from the union was induced by petitioner's conduct in dealing directly with the employees." 321 U. S. at page 681.

And, if there could be any question as to the scope of the *Franks Bros.* doctrine, the Supreme Court set it at rest in a footnote to the above quoted statement:

> "It has now long been settled that FINDINGS OF THE BOARD, AS WITH THOSE OF OTHER ADMINISTRATIVE AGENTS, ARE CONCLUSIVE UPON REVIEWING COURTS WHEN SUPPORTED BY EVIDENCE, that the weighing of conflicting evidence is for the Board and not for the courts, that the inferences from the evidence are to be drawn by the Board and not by the courts, save only as questions of law are raised, and that upon such questions of law, the experienced judgment of the Board is entitled to great weight." (Emphasis supplied.) 321 U. S. at page 681, footnote 1.

Like the *Franks Bros.* case, the *Lorillard* case involved a situation in which the union concededly possessed a majority at the time of the employer's refusal to bargain, and the Supreme Court sustained the Board's insistence that Lorillard "Must remedy the effect of its prior unlawful refusal to bargain by bargaining with the union shown to have had a majority on the date of Lorillard's refusal to bargain." This case, therefore, dealt with the appropriateness of the Board's remedy, and not with the question of causation.

**The Requirements of Section 10 of the Act**

As indicated above, the *Franks Bros.*, *Medo* and *Lorillard* cases afford no support for a presumption of a causal relation between the employers' unfair labor practices and the union's loss of majority. Each of those cases requires that the fact of causation be supported by a finding of fact

grounded upon substantial evidence in the record. Each of those cases was decided before the 1947 amendments to the Act.

Since the 1947 amendments to Section 10(c), (e), and (f) it is, we submit, plain that the Board's conclusion on such a question of fact must be supported by a finding of fact grounded upon a preponderance of the testimony [Section 10(c)] or in any case upon substantial evidence on the record considered as a whole [Section 10(e), (f)]. *Superior Engraving Company v. N. L. R. B.*, No. 9920, C. C. A. 7, cited June 27, 1950, 26 L. R. R. M. 2351, 2358; *Pittsburgh Steamship Co. v. N. L. R. B., 69 S. Ct. 1283, 337 U. S. 656, 93 L. Ed. 443.*

In the *Superior Engraving* case, the Court of Appeals for the Seventh Circuit stated:

> "The Board, finding no evidence in the record to indicate that the union withdraw its members from petitioner's employ, presumed that the loss of majority was due to petitioner's unfair labor practices. In view of the requirements in Section 10(c) of the Act as amended, that the Board's findings must be based on the preponderance of the testimony taken, it seems clear that the Board erred in conclusively presuming that the loss of majority was caused by petitioner's unfair labor practices, for, as examiner pointed out, all the men who were called as witnesses testified that they left for better paying jobs or to enter military service."

We submit that the Court of Appeals' approval of the Board's presumption, supported by no evidence and contradicted by such evidence as appears in the record, is in

conflict with all applicable authority, and requires setting aside of the Board's order.

## CONCLUSION

We respectfully urge upon this Court the importance of the problems presented by this case and the urgent need for a decision by this Court upon the subject.

WHEREFORE, your Petitioner respectfully prays that a Writ of Certiorari issue out of and under the seal of this Honorable Court directed to the United States Court of Appeals for the District of Columbia Circuit, commanding that Court to certify and send to this Court for review and determination on a day certain, to be named therein, a full and complete transcript of the record and proceedings in the case numbered and entitled on its docket No. 10,465, *West Texas Utilities Company, Inc., Petitioner v. National Labor Relations Board, Respondent; International Brotherhood of Electrical Workers (AFL), Intervenor*, and that Petitioner may be allowed to present a complete brief on the merits of each of the questions raised herein, and may have such other and further relief as may be just in the premises.

Respectfully submitted,

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I certify that copies of this brief have been furnished the Respondent, National Labor Relations Board and Intervenor, International Brotherhood of Electrical Workers (AFL).

.....

FRANK CAIN.

## APPENDIX 1

### N. L. R. B. v. HIGHLAND PARK MFG. CO.
### U. S. Court of Appeals, Fourth Circuit (Richmond)

NATIONAL LABOR RELATIONS BOARD v. HIGHLAND PARK MANUFACTURING COMPANY, No. 6082, SEPTEMBER 2, 1950.

26 L. R. R. M. 2531

Before Parker, Chief Judge, and Soper and Dobie, Circuit Judges.

**Full Text of Opinion**

Parker, Chief Judge:—This is a petition to enforce an order of the National Labor Relations Board which directed the Highland Park Manufacturing Co. at its Rock Hill, S. C. plant to bargain with the Textile Workers Union of America, affiliated with the C. I. O., as the bargaining agent of its employees. Question is raised as to whether the union obtained a majority vote in the election held to determine the bargaining representative, but we need not go into this, as we think that the Board proceeded upon an erroneous theory of law in ordering the company to bargain with T. W. U. A. upon its petition, when that union at the time was affiliated with the C. I. O., whose officers had not then complied with the statute requiring the filing of non communist affidavits. The Board applied the rule which it had laid down, contrary to the opinion of general counsel and with one member dissenting, in Matter of Northern Virginia Broadcasters 75 N. L. R. B. 11 [20 LRRM 1319]. The question presented here is identical with that before the Court of Appeals of the Fifth Circuit in N. L. R. B. v. Postex Cotton Mills 5 Cir. 181 F. 2d 919 [26 LRRM 2116], which involved the application of the same rule; and we agree with the decision of that court reversing the action of the Board for the reasons set forth in the comprehensive and able opinion of Judge Russell.

[THEORY OF BOARD]

We find no ambiguity in the language of the governing statute. On the contrary it provides as clearly as language can that the power of the Board may not be invoked by a labor organization unless there is on file the affidavits which the statute requires executed "by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit."* The C. I. O. is unquestionably a national labor organization and the T. W. U. A. is admittedly affiliated with it. The argument of the Board that filing is required only of the officers of an organization of which the bargaining union is a constituent and subordinate unit is negatived by the language which requires filing by the officers of the international organization of which the bargaining union is "an affiliate" as well as where it is a "constituent unit."

[DOUDS CASE]

As there is no ambiguity in the language of the statute, there is no occasion to resort to the rules of construction; but, if resort be had to these, the result is the same. The reason and purpose of the provision was to eliminate communists and others seeking the overthrow of the government by force from positions in which they would be able to use the power of labor organization which the statute was fostering, in the aid of political strikes and other dan-

* The statute is as follows: "No investigation shall be made by the Board of any question affecting commerce concerning the representatives of employees, raised by a labor organization under subsection (c) of this section, no petition under subsection (e) (1) of this section shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of sections 286, 287, 1001, 1022, and 1023 of Title 18 shall be applicable in respect to such affidavits." Sec. 9(h), Labor Management Relations Act, 61 Stat. 146, 29 USCA sec. 159(h).

gerous disruptions of industry. As to this Chief Justice Vinson in the recent case of C. I. O. v. Douds, 339 U. S. 382, 70 S. Ct. 674 [26 LRRM 2084], said:

> "The constitutional justification for the National Labor Relations Act was the power of Congress to protect interstate commerce by removing obstructions to the free flow of commerce. National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1 [1 LRR Man. 703] (1937). That Act was designed to remove obstructions caused by strikes and other forms of industrial unrest, which Congress found were attributable to the inequality of bargaining power between unorganized employees and their employers. It did so by strengthening employee groups, by restraining certain employer practices, and by encouraging the process of collective bargaining.
>
> "When the Labor-Management Relations Act was passed twelve years later, it was the view of Congress that additional impediments to the free flow of commerce made amendment of the original Act desirable. * * *
>
> "One such obstruction, which it was the purpose of sec. 9(h) of the Act to remove, was the so-called 'political strike.' Substantial amounts of evidence were presented to various committees of Congress, including the committees immediately concerned with labor legislation, that Communist leaders of labor unions had in the past and would continue in the future to subordinate legitimate trade union objectives to obstructive strikes when dictated by Party leaders, often in support of the policies of a foreign government. And other evidence supports the view that some union leaders who hold to a belief in violent overthrow of the Government for reasons other than loyalty to the Communist Party likewise regard strikes and other forms of direct action designed to serve ultimate revolutionary goals as the primary objectives of labor unions which they control. * * *

> "It is sufficient to say that Congress had a great mass of material before it which tended to show that Communists and others proscribed by the statute had infiltrated union organizations not to support and further trade union objectives, including the advocacy of change by democratic methods, but to make them a device by which commerce and industry might be disrupted when the dictates of political policy required such action."

Mr. Justice Jackson, in his concurring opinion in the Douds case, had this to say, as to the reason and purpose of the statutory provision:

> "The Communist Party * * * is not primarily interested in labor's vote, for it does not expect to win by votes. It strives for control of labor's coercive power—the strike, the sit-down, the slow-down, sabotage, or other means of producing industrial paralysis. Congress has legalized the strike as labor's weapon for improving its own lot. But where Communists have labor control, the strike can be and sometimes is perverted to a party weapon. In 1940 and 1941, undisclosed Communists used their labor offices to sabotage this Nation's effort to rebuild its own defenses. * * *
>
> "This labor leverage, however, usually can be obtained only by concealing the Communist tie from the union membership. Whatever grievances American workmen may have with American employers, they are too intelligent and informed to seek a remedy through a Communist Party which defends Soviet conscription of labor, forced labor camps and the police state. Hence the resort to concealment, and hence the resentment of laws to compel disclosure of Communist Party ties. The membership is not likely to entrust its bargaining power, its records, and its treasury to such hands. When it does, the union finds itself a more or less helpless captive of the Communist Party. Its officers cease to be interested in correcting grievances

but seek to worsen and exploit them; they care less for winning strikes than that they be long, bitter and disruptive. They always follow the Communist Party line, without even knowing its source or its objectives. The most promising course of the Communist Party has been the undercover capture of the coercive power of strategic labor unions as a leverage to magnify its power over the American people."

## [INTENTION OF CONGRESS]

In the light of this purpose, it is perfectly clear that it is much more important to exclude communists and others plotting the overthrow of the government by force from holding office in the great national labor organizations such as the C. I. O. and the A. F. L. than to exclude them from office holding in their affiliates; and it is not reasonable to suppose that Congress did not intend the officers of the former to be covered by its provisions. It is true that it is the officers of the affiliates who call the strikes; but it is the officers of the national or parent organizations who shape labor policies that cause the strikes to be called, and this is particularly true of general strikes or strikes having a political purpose. As was well said by Member Gray in his dissenting opinion in Northern Virginia Broadcasters, supra:

> "The officers of the A. F. L. and the C. I. O. have been recognized as the spokesmen and representatives of organized labor in this country. It was the A. F. L. Executive Council which recommended on December 15, 1941, that 'a no-strike policy shall be applied in all war and defense * * * industries.' On the following day, the conference of A. F. L. presidents adopted this recommendation.
>
> "The extent of the influence wielded by the A. F. L. is also apparent from the control which it exercises over the 'jurisdiction' of its member unions. Awards of the governing body may be subject to enforcement through explusion from the organization. Conversely, the member unions exercise a measure of control over

their parent organization through the election of its officers.

"It is therefore apparent that the A. F. L. may exercise direct and influential control over its constituent unions in important respects and that A. F. L. officers occupy a strategic position to affect the economic life of the Nation. Under these circumstances, it is inconceivable that Congress was not concerned with the Communist affiliation of the officers of the A. F. L. and C. I. O. in accomplishing its intended purpose of purging labor of Communist influence."

**[TEXAS UTILITIES CASE]**

We have carefully considered the argument to the contrary in the majority opinion in West Texas Utilities Co. v. N. L. R. B., D. C. App.—F. 2d—[26 LRRM 2359]; but we are not impressed by it. We agree with the statement of Judge Russell in the Postex case, supra, that the Congressional purpose was to "wholly eradicate and bar from leadership in the American labor movement, at each and every level, adherents to the communist party and believers in the constitutional overthrow of our government." If the statute is construed in accordance with its express language to deny governmental support to unions that are affiliated with national organizations which refuse to comply with its anti-communist provisions, the result will be either that the national organizations will comply with the statute, or that they will be segregated from the effective body of loyal American labor by the withdrawal of their affiliates. In either event, the labor movement will be effectively protected from the danger of communist leadership in the formulation of labor policies; and this is evidently the end to which the legislation was directed. We see no occasion to emasculate the statute by resorting to forced rules of interpretation when its language is perfectly clear and gives unqualified support to the purpose which Congress had in mind. The office of interpretation is to resolve ambiguities, not to create them.

Nothing contrary to our decision here was decided in N. L. R. B. v. Harris-Woodson Co., 179 F. 2d 720 [25

LRRM 2346], since in that case the question now before us was not raised. It was assumed in that case on all sides that the filing by the officers of the T. W. U. A. was a sufficient compliance with the statute and the only question was whether the bargaining union could avail itself of the change of affiliation which had taken place.

For the reasons stated, enforcement of the Board's order will be denied and the order will be set aside.

Enforcement denied.

## APPENDIX 2

# United States Court of Appeals
## FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**No. 10465**

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WEST TEXAS UTILITIES COMPANY, INC., *Petitioner,*

*v.*

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS (A. F. L.), *Intervenor.*

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*On Petition to Review and on Cross Petition for Enforcement of an Order of the National Labor Relations Board*

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Argued May 22, 1950 Decided July 10,1950

Before Edgerton, Wilbur K. Miller and Bazelon, Circuit Judges.

BAZELON, Circuit Judge: Review is sought of a Board order requiring petitioner to cease and desist from refusing to bargain with three locals of the International Brotherhood of Electrical Workers,[1] A. F. L. These locals had been certified as the representative of a majority of the employees in an appropriate bargaining unit on August 12, 1946. During the period September 19, 1947 to October 18, 1947, petitioner refused to bargain, basing such refusal

[1] Referred to hereafter as IBEW. Petitioner is referred to as the Company.

upon the expressed view of the Board's General Counsel that the officers of the American Federation of Labor[2] (with which the IBEW is affilated) must first file non-Communist affidavits. The Board subsequently repudiated this interpretation[3] and the Company agreed to resume collective bargaining. But once again, in early November of 1947, the Company refused to bargain—this time because the locals allegedly no longer represented a majority of the employees. A charge of unfair labor practice was then filed by the locals and a complaint was issued by the General Counsel on November 12.[4] Meanwhile, on November 8, the federation officers had filed the affidavits allegedly required of them by 9(h), 29 U. S. C. A. § 159(h). The officers of the locals and of the IBEW were in compliance at all times relevant to this proceeding.

I

This case involves the construction of the non-Communist affidavit provision, § 9(h), of the Labor Management Relations Act of 1947, 29 U. S. C. A. § 159(h). That section reads:

> No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under subsection (e)(1) of this section shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and *the officers of any national or international labor organization of which it is an affiliate or constituent unit* that he is not a member of the Communist Party or affiliated

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[2] Referred to hereafter as AFL or federation.

[3] Matter of Northern Virginia Broadcasters, Inc., 75 N. L. R. B. 11 (1947).

[4] The complaint charged unfair labor practices within the meaning of 29 U. S. C. A. § 8(a)(1) and (5).

> with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. [Emphasis supplied.]

The Board held that the key phrase—"national or international labor organization"—does not ordinarily include the American Federation of Labor,[5] relying upon its prior decision in the *Northern Virginia Broadcasters* case.[6] That decision was based on (1) the federation's lack of participation in the collective bargaining process, (2) the policy of § 9(h), and (3) the technical meaning of "national or international labor organization" as referring the national and international unions which are the autonomous members of the federation.

The Supreme Court has admonished us many times to give "great weight" to an agency's interpretation of its governing statute, especially where the legislative intent is ambiguous.[7] Such deference keeps the inexpertness of courts, which must deal with the whole gamut of the law, from distorting the policy of Congress in complex areas of the economy requiring specialized skills and scrutiny. It minimizes the danger that lay constructions will be given to words which are terms of art to those schooled in their special fields. The Board has drawn its conclusion that the federation is not a "national or international labor organization" from its familiarity with the terminology

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[5] This decision is qualified by another Board ruling, to the effect that when the federation occupies a position in relation to one of its component parts similar to that of a national or international and its local, the federation officers must comply with § 9(h). A federation finds itself in such a position in its relations with an "organizing committee" which is directly chartered and supervised by it. *Matter of American Optical Co.*, 81 N. L. R. B. 453 (1949).

[6] *Supra*, note 3.

[7] See, e. g., *United States v. American Trucking Ass'ns*, 310 U. S. 534, 549 (1940); *Norwegian Nitrogen Co. v. United States*, 288 U. S. 294, 315 (1933) ("[Administrative] practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new").

and the practices of the labor field. We think such a construction is consistent with both the history and the policy of 9(h). The Joint Committee on Labor-Management Relations—appointed by Congress to report upon the functioning of the new Act—appears to have been of like mind. In its annual report, the Committee analysed the Board's early decisions under the Act, specifically summarizing the Board's holding that federation officers were not ordinarily required to file affidavits. Although a number of criticisms and suggestions were made by the Committee, no objections were raised to the Board's construction of 9(h).[8]

The most authoritative discussion of 9(h) is found in the Supreme Court's recent decision in *American Communications Assn. v. Douds*, 339 U. S. 382 (1950). It was held therein that the constitutional justification for a non-Communist affidavit lay in its function as a deterrent to political strikes which might seriously burden interstate commerce. The emphasis throughout the opinion was that 9(h) was aimed at those who control the collective bargaining process and hence are in a position to call political strikes. Thus, Mr. Chief Justice Vinson, speaking for the Court, pointed out that Communists might carry their revolutionary objectives "into their conduct of union affairs by calling political strikes";[9] that their beliefs "strongly indicate a will to engage in political strikes and other forms of direct action when, as officers, they direct union activities."[10] It was expected, said Mr. Justice Jackson, concurring in part and dissenting in part, that when the Communist affilation of union officers was called to the attention of the union membership, it would no longer

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[8] The Board decision in the *Matter of Northern Virginia Broadcasters, Inc., supra* note 3, is summarized in the Report of Joint Committee on Labor Management Relations, *Labor-Management Relations*, Sen. Rep. No. 986, 80th Cong., 2d Sess., Pt. 1, p. 11; Pt. 3, pp. 36-37 (1948). See treatment of Committee approval of administrative construction as an expression of congressional acceptance in *Herzog v. Parsons*, 181 F. 2d 781, 788 (U. S. App. D. C. 1950). It is worthy of some note that Senator Taft, one of the principal sponsors of the bill, said that the Board's decision was " 'certainly not in conflict with the intention of Congress' (New York Times, Oct. 8, 1947, p. 6)." Board's Brief, p. 22 n. 11.

[9] 339 U. S. at 407.

[10] *Ibid.*

"entrust its bargaining power, its records, and its treasury to such [Communist] hands. When it does * * * [i]ts officers cease to be interested in correcting grievances but seek to worsen and exploit them; they care less for winning strikes than that they be long, bitter and disruptive."[11] To prevent such a distortion of the Act's overriding purpose—which is the promotion of peaceful collective bargaining—Congress could "protect a labor union from Communist Party domination * * * [just as] from employer domination."[12]

Analysis of the functions performed by the various entities involved here makes it clear that it is the locals and their parent nationals or internationals who call strikes and who participate in the collective bargaining process.[13] It is the officers of these organizations who are amenable to the pressure of the union membership via the election machinery.[14] In contrast, neither the federation nor its officers, as such, have authority to call strikes; they do

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[11] *Id.* at 431.

[12] *Id.* at 433. Mr. Justice Frankfurter separately stated the problem as whether or not Congress could "keep Communists out of controlling positions in labor unions as a condition to utilizing the opportunities afforded by the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947." *Id.* at 416. He concluded that it was permissible for Congress to decide that "trade unions which are guided by officers who are committed by ties of membership to the Communist Party must forego the advantages of the Labor Management Relations Act * * *." *Id.* at 418.

[13] According to the Board's brief, p. 16:

> "Article XVII, Section 7 of the Constitution of the International Brotherhood of Electrical Workers (1947 ed.), the International union with which the charging party before the Board in these proceedings is affiliated, provides that all agreements made by a local union must be approved by the International's President, and that if necessary he may make such corrections as are required to conform to the International's policy. The control thus vested in the International extends as well to any by-law or rule of the local, or jurisdictional controversy to which the local may be a party. Article IX, Sections 6 and 7, empowers the International's Executive Council to suspend or revoke the local's charter, or to take charge of its affairs when it is deemed 'necessary to protect or advance the interests of its members and the IBEW;' and Article XVII, Section 13, requires that strikes may be called by a local only after approval by the International's president."

[14] See Mr. Justice Black's dissenting opinion in the *American Communications Assn.* case, where he describes 9(h) as a law which coerces "union members not to elect any Communist as an officer." 339 U. S. at 450.